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06-531

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DAVID B. STRUHS AND TERENCE COULLITTE,

Petitioners,

—v.—

T.A. WYNER AND GEORGE SIMON,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE CASE

Respondent T.A. Wyner's long history of engaging in expressive conduct within the John D. MacArthur Beach State Park is fully set forth in the trial court's preliminary injunction opinion. *See Wyner v. Struhs*, 254 F.Supp.2d 1297 (S.D. Fla. 2003)(Pet.App.9a-22a). By placing events in context, including the pre-existing relationship between the parties and the nature of Wyner's expressive activities within the park, the district court's opinion provides a more comprehensive description of the underlying litigation than the petition for *certiorari*.

For present purposes, a few facts bear particular emphasis. This case began when Petitioners denied Respondents' request for permission to create a temporary art installation composed of nude bodies in the form of a peace sign as part of an anti-war demonstration scheduled to take place in MacArthur Beach State Park on February 14, 2003. Respondents therefore sought immediate injunctive relief from the district court permitting the demonstration to go forward as planned. That request was granted in full. Although labeled a preliminary injunction, the district court's order provided Respondents with *all* the immediate relief they were seeking. Specifically, it allowed Respondents to proceed with the demonstration that Petitioners had attempted to prevent on the date that Respondents had initially chosen. Respondents also sought a permanent injunction prohibiting Petitioners from interfering with future expressive activities and damages for the denial of their First Amendment rights. Those requests were denied by the district court in a subsequent summary judgment order that Respondents chose not to appeal. (Pet.App. 23a-48a).

At the conclusion of the case, the district court awarded attorneys' fees solely for the time that Respondents had spent on the preliminary injunction, Order dated August 16, 2004 (App. 1a-13a), and the court of appeals affirmed. (Pet. App. 1a-8a). In doing so, both lower courts recognized that the preliminary injunction provided Respondents with final and complete relief on the actual dispute that gave rise to this litigation. As the Eleventh Circuit noted in rejecting as moot Petitioners' effort to appeal the preliminary injunction, "the injunction was about a finite event that occurred and ended on a specific, past date." *Wyner v. Struhs*, 179 Fed. Appx. at 566 n.1 (citing *Johnson v. Fla. High School Activities Assoc., Inc.*, 102 F.3d 1172 (11th Cir. 1997))(Pet. App. 5a-6a). Accordingly, the Eleventh Circuit ruled, "[Respondents] are entitled to prevailing party status and attorney's fees because the court granted the preliminary injunction on the merits and [Respondents] obtained the primary relief they sought. The district court properly limited the fee award to the degree of [Respondents'] success." *Id.* at 569 (Pet.App. 5a)(citations omitted).

REASONS FOR DENYING THE WRIT

I. The District Court And Eleventh Circuit Correctly Ruled On The Facts Of This Case That Respondents Are Prevailing Parties Under This Court's Controlling Precedents.

It has been thirty years since Congress adopted the Attorneys' Fee Act of 1976, 42 U.S.C. § 1988, and the standards for determining prevailing party status in civil rights litigation have been clearly defined in the intervening three decades. Those well-understood standards are routinely applied by federal courts throughout the country

on a daily basis and were correctly applied by the lower courts in this case. Petitioners' claim that Respondents should not receive any attorneys' fees because they did not achieve any meaningful success in this litigation is both wrong on the facts and misapprehends this Court's rulings. In either event, it does not warrant plenary review by this Court.

A. Respondent Achieved Significant Success On A Critical Issue In This Case.

Respondent Wyner sought permission from Petitioners to create a peace symbol composed of nude human bodies in a public park as part of a protest against the Iraq war. Permission was denied. (Pet.App. 10a). Because a violation of a state park rule is a misdemeanor under state law, Fla. Stat. § 258.007(2), Wyner was left to proceed at her legal peril.[1] Rather than take that risk, Respondents filed suit seeking to prevent Petitioners from "denying or otherwise interfering with the creation of a temporary art installation comprised of nude bodies in the form of a peace sign in MacArthur Beach State Park on February 14, 2003." Verified Complaint, para. 10.

Respondents achieved exactly that relief. The district

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[1] Indeed, Ms. Wyner had previously been arrested twice at the park while engaging in peaceful protest and artistic endeavors. *Wyner v. Struhs*, 254 F.Supp.2d at 1299 (Pet.App. 11a). Wyner was thus situated "between the Scylla of intentionally flouting state law and the Charybdis of forgoing what [s]he believe[d] to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Steffel v. Thompson*, 415 U.S. 452, 462 (1974).

court's preliminary injunction order compelled Petitioners to abandon their announced intention to prevent nudity in conjunction with the peace symbol. (Pet.App. 9a). Thus, as the district court explained: "[Respondents] were therefore able to obtain the primary relief sought in their complaint, a preliminary injunction prohibiting state officials at the park from arresting Ms. Wyner or otherwise interfering with her temporary art installation on February 13, 2003." (Pet.App. 45a.). The district court later explained:

> [Petitioners] argue that [Respondents] are not prevailing parties because they did not ultimately prevail on a legal issue. [Respondents] did prevail on a legal issue. [Respondents] brought both facial and as applied challenges to the park restrictions. The Court ruled in [Respondents'] favor on their prayer "for injunctive relief prohibiting [Petitioners] from denying or otherwise interfering with the creation of a temporary art installation comprised of nude bodies in the form of a peace sign in MacArthur Beach State Park on February 14, 2003." The Court's Order granting [Respondents'] motion prevented [Petitioners] from preventing or interfering with [Respondents'] February 14, 2003 temporary art installation. The preliminary injunction expired on its own terms.

Order dated August 16, 2004 (App. 3a-4a)(citation omitted).

Having achieved the primary purpose for filing this litigation through court order entered after consideration of

the merits,[2] under this Court's controlling precedents, Respondents were prevailing parties entitled to an award of fees to the extent of their success.

B. The District Court's Order Materially Changed The Legal Relationship Between The Parties.

The standard for "prevailing party" under 42 U.S.C. § 1988 is well established:

> If the plaintiff has succeeded on "any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit," the plaintiff has crossed the threshold to a fee award of some kind. ... Thus, at a minimum, to be considered a prevailing party within the meaning of §1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant. ... The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute. Where such a change has occurred, the degree of the plaintiff's overall success goes to the reasonableness of the award under *Hensley* [*v. Eckerhart*, 461 U.S. 424 (1983)], not to the availability of a fee award *vel non*.

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[2] "As an initial matter, we accept that the preliminary injunction in this case decided a substantive issue – whether or not the state officials could arrest the nude peace symbol participants – and thus was on the merits." *Wyner v. Struhs*, 179 Fed. Appx. at 568 (Pet.App. 2a-3a).

Texas State Teachers Ass'n v. Garland Independent School Dist., 489 U.S. 782, 791-3 (1989)(citations omitted). *See also Farrar v. Hobby*, 506 U.S. 103, 111-112 (1992)("In short, a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.").

This "change in legal relationship" standard for determination of prevailing party status has been in use by lower courts for years, and those courts – including the Eleventh Circuit – have consistently analyzed preliminary injunctions to determine whether the injunction merely preserved the *status quo* (thereby only scoring a "procedural" victory) or gave the plaintiff a benefit sought in the litigation. *Compare Ketterle v. B.P. Oil, Inc.*, 909 F.2d 425, 429 (11th Cir. 1990)(preliminary injunction sufficient to confer prevailing party status because plaintiffs secured relief they had sought: "In determining whether a plaintiff is a 'prevailing party,' it is necessary to evaluate the facts of each particular case."), with *Markham v. International Ass'n of Bridge, Structural and Ornamental Iron Workers*, 901 F.2d 1022 (11th Cir. 1990)(preliminary injunction insufficient to confer prevailing party status because injunction did not change the legal relationship between the parties but rather preserved the *status quo*).[3] *See also:*

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[3] Petitioners' reference to *University of Texas v. Camenisch*, 451 U.S. 390 (1981), is misplaced. In *Camenisch*, a deaf student had been granted a preliminary injunction, conditioned on the payment of a bond, requiring the University to provide an interpreter. By the time the court of appeals affirmed the granting of the preliminary injunction, the student had graduated, thereby mooting the issue of whether the preliminary injunction should stand. The only issue remaining on remand was the question of who should pay for the interpreter – the

(footnote continued ...)

Taylor v. City of Fort Lauderdale, 810 F.2d 1551, 1558 (11th Cir. 1987)(grant of a preliminary injunction on the merits, as opposed to temporary relief maintaining the *status quo*, entitles one to prevailing party status); *Select Milk Producers, Inc. v. Veneman*, 304 F.Supp.2d 45 (D. D.C. 2004)(prevailing party status where preliminary injunction created "material alteration in the legal relationship between the parties"), *aff'd in part, rev'd in part on other grounds and remanded*, 400 F.3d 939 (D.C. Cir. 2005); *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1160-61 (9th Cir. 2000)(temporary restraining order, which prohibited public officials from interfering with exhibition containing non-obscene erotic art, was sufficient to confer prevailing party status because the injunction did more than preserve the *status quo*, it "allowed the convention and art exhibit to take place"); *Atlanta Journal and Constitution v. City of Atlanta Dept. of Aviation*, 6 F.Supp.2d 1359 (N.D. Ga. 1998)(change in legal relationship between parties sufficient to make plaintiff prevailing party). *See also*: *Select Milk Producers, Inc., v. Johanns*, 400 F.3d at 943 ("Milk Producers received irreversible relief by virtue of the preliminary injunction" and hence were prevailing parties); *Role Models America, Inc. v. Brownlee*, 353 F.3d 962, 966 (D.C. Cir. 2004)(prevailing party where preliminary injunction brought "a change in someone's primary conduct in the real world ... [such as by the] imposition of a restriction on others.")(citation omitted); *Thomas v. National Science Foundation*, 330 F.3d 486 (D.C. Cir. 2003)(not prevailing

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(... footnote continued)
school or the student. Prevailing party status was not an issue. Moreover, Petitioners here did not seek a stay or immediate review of the preliminary injunction, affirmatively choosing to comply with the district court's order.

party where preliminary injunction merely preserved the *status quo*); *John T. v. Del. County Intermediate Unit*, 318 F.3d 545 (3rd Cir. 2003)(same); *Race v. Toledo-Davila*, 291 F.3d 857 (1st Cir. 2002)(same); *Coalition for Basic Human Needs v. King*, 691 F.2d 597, 601 (1st Cir.1982)(awarding attorney's fees to plaintiffs who obtained injunction pending appeal where the court "made its decision only after careful consideration of the [plaintiffs'] legal claims").

The district court's preliminary injunction in this case brought about a material change in the legal relationship between the parties. Petitioners in the past have, as they did here, threatened to enforce park rules if Respondent Wyner engaged in similar expressive activities, and in fact enforced their threats by arresting her for violating park rules. Thus, but for the injunction, Petitioners here would have arrested Wyner for violating park rules, and prohibited the production of a nude peace symbol. Petitioners were compelled by court order, under pain of contempt, to permit Respondents' display. Hence, Respondents met the prevailing party standard enunciated by this Court. As the Eleventh Circuit correctly understood, "a preliminary injunction on the merits, as opposed to a merely temporary order which decides no substantive issues but merely maintains the status quo, entitles one to prevailing party status and an award of attorney's fees," Pet.App. 2a (quoting *Taylor v. City of Fort Lauderdale*, 810 F.2d 1551, 1558 (11th Cir. 1987)).

C. *Buckhannon* Did Not Change The Rules For Prevailing Party Status That Apply In This Case.

The decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Services*, 532 U.S. 598 (2001), cited by Petitioners, does not

change the analysis. In *Buckhannon*, this Court rejected the "catalyst" theory, holding that a judicially sanctioned change in the legal relationship of the parties was necessary for an award of fees.

The preliminary injunction in this case, violation of which would have been sanctionable by contempt, clearly constituted a judicially sanctioned change in the legal relationship of the parties. Nothing in *Buckhannon* undermines the district court's determination, or the Eleventh Circuit's affirmance, that Respondents were prevailing parties as a result.

> Although *Buckhannon* decisively rejected the "catalyst theory," the Court clearly did not adopt a rule that plaintiffs could only be deemed "prevailing parties" for fee-shifting purposes if they obtained a final judgment on the merits of a suit.
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> * * *
>
> In short, the holding in *Buckhannon* embraces the possibility that, under certain circumstances, a preliminary injunction, like a consent decree, may result in a court-ordered change in the legal relationship between the parties that is sufficient to make the plaintiff a "prevailing party" under a fee-shifting statute ... . Therefore, *Buckhannon* surely does not endorse a *per se* rule that a preliminary injunction can never transform a party in whose favor the injunction is issued into a "prevailing party" ... .

Select Milk Producers, Inc., v. Johanns, 400 F.3d at 945. *See also Dubuc v. Green Oak Township*, 312 F.3d 736, 753-4

and n. 8 (6th Cir. 2002)(acknowledging *Buckhannon*'s rejection of the catalyst theory, but holding that preliminary injunctions can support prevailing party status where the relief afforded was not merely procedural, only preserving the *status quo*); *Watson v. County of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002)(distinguishing *Buckhannon* and finding prevailing party status based upon a preliminary injunction), *cert. denied*, 538 U.S. 923 (2003); *Maine School Administrative Dist. No. 35 v. Mr. R.*, 321 F.3d 9, 15-16 (1st Cir. 2003)(acknowledging *Buckhannon*, court found parents to be prevailing parties despite school district's dismissal of action after school's request for injunction to bar student from attending school was denied); *Palmetto Properties v. County of DuPage*, 375 F.3d 542, 547-52 (7th Cir. 2004)(analyzing *Buckhannon* and finding that county's repeal of provision found to be unconstitutional before entry of final judgment resulted in dismissal for mootness did not deprive plaintiff of prevailing party status), *cert. denied*, 543 U.S. 1089 (2005); *Environmental Protection Information Center, Inc. v. Pacific Lumber Co.*, 229 F.Supp.2d 993, 1004 (N.D. Cal. 2002)(despite dismissal of action for mootness following initial injunctive relief, plaintiffs were prevailing parties: "Defendants did not stop logging voluntarily, but as a result of the court-issued TRO and September 3 preliminary injunction. '[A] defendant acting in accordance with a court order cannot be presumed to be acting gratuitously.' Even absent a final written order, defendants could have been held in contempt had they continued logging in contravention of the court order. Thus, plaintiffs' efforts resulted in a court-ordered change in the relationship between the parties, supporting compensation under *Buckhannon*.")(citation omitted), *aff'd*, 103 Fed. Appx. 627 (9th Cir. 2004). *See also P.N. v. Clementon Bd. of Educ.*, 442 F.3d 848, 854-55 (3rd Cir.)(enforceable

administrative consent decrees satisfy *Buckhannon*), *cert. denied*, __ S.Ct. __, 2006 WL 1880360 (October 2, 2006).

Buckhannon spelled the demise of the catalyst theory, but it did not purport to change the "material alteration of the legal relationship of the parties" standard set forth in *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782. Indeed, *Buckhannon*'s decision relies, in part, upon that test. 532 U.S. at 604. That Respondents unsuccessfully sought additional relief does not diminish the fact that the lawsuit materially changed the legal relationship between the parties and altered Petitioners' announced intent to prevent the display of a peace symbol composed of nude bodies on February 13, 2003. Without the lawsuit, and the resulting injunction entered by the district court following an evidentiary hearing, the state officials would have been free to prevent or interfere with Respondents' plans. The injunction affirmatively prohibited state officials at the park from arresting Ms. Wyner or otherwise interfering with the production of a nude peace symbol, and permitted the protest to proceed without interference. The relief obtained by Respondents, though labeled a "preliminary injunction," was for all practical purposes a "final injunction" because it afforded irreversible relief to Respondents.[4]

Because Respondents obtained the primary relief sought in their complaint and Petitioners' change in conduct was a direct result of a court order, Respondents are prevailing parties for purposes of 42 U.S.C. § 1988 to the

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[4] Notably, Petitioners did not seek an interlocutory appeal or file a motion to vacate the preliminary injunction. Rather, they purposely chose to comply with the terms of the injunction which subsequently expired upon its own terms.

extent of their success, as found by the district court and affirmed by the Eleventh Circuit.

II. There Is No Meaningful Conflict Among The Circuits That Requires Resolution By This Court.

Petitioners can only point to *Smyth v. Rivero*, 282 F.3d 268 (4th Cir.), *cert. denied*, 537 U.S. 825 (2002), in an effort to manufacture a "split" in the Circuits on whether a preliminary injunction, standing alone, is sufficient to confer prevailing party status upon a plaintiff seeking attorney's fees. While the opinion in *Smyth* undeniably contains broad dicta on this subject, its actual holding is considerably narrower given the facts of the case, and, given those facts, is reconcilable with both the decision below and the consensus view of other circuits.

In *Smyth*, the Fourth Circuit denied prevailing party status to plaintiffs who obtained a preliminary injunction in a case otherwise identical to *Buckhannon* – plaintiffs challenged a state regulation, the district court preliminarily enjoined its enforcement, the state repealed the regulation, and the court dismissed the case as moot. *Buckhannon* foreclosed the plaintiffs' claim that they were prevailing parties because their lawsuit was the catalyst for repeal of the regulation, leaving only the argument that the preliminary injunction sufficed to make them a prevailing party.[5] The Fourth Circuit disagreed, noting that the injunction entered by the district court only preserved the *status quo* – permitting the plaintiffs to continue receiving

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[5] A second argument, based upon a claim that a settlement constituted a judicially enforceable consent decree, was also rejected by the court. The *Smyth* opinion devotes considerably greater attention to rejecting this second argument. *Smyth v. Rivero*, 282 F.3d at 278-85. That claim and the court's holding are not relevant here.

benefits pending the outcome of the litigation, and rested heavily on the balance of equities rather than an assessment of the merits of the litigation.

By contrast, Wyner sued to secure the right to produce a peace symbol composed of live human bodies to protest against the war in Iraq. The district court entered a preliminary injunction that altered the *status quo*, permitting the Respondent to go forward with her plan, and did so after a thorough exegesis of controlling First Amendment doctrine.[6] In short, the *Smyth* injunction merely maintained the *status quo ante* pending a full inquiry into the merits that

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[6] In an effort to bolster *Smyth*'s concern for the often hasty nature of emergency relief, Petitioners implicitly suggest (pp. 4, 15-6) that they were disadvantaged by the preliminary injunction hearing. Petitioners raised this concern for the first time on appeal to the Eleventh Circuit, arguing that they were deprived of notice and an opportunity to oppose Respondents' claims at the preliminary injunction hearing. The record reflects otherwise.

Petitioners were represented by three attorneys at the preliminary injunction hearing. Petitioners submitted both a memorandum of law in opposition to the motion for preliminary injunction and copies of cases to the district court for consideration prior to the hearing and the issuance of the injunction. Petitioners' counsel asserted that the facts were not disputed and that there was only a legal question as to whether Wyner could produce a peace symbol composed of nude human bodies. Upon hearing Respondents' counsel's summary of what Ms. Wyner would testify to, Petitioners' counsel chose not to dispute the facts.

Petitioners' counsel made no objection to going forward at the time of the hearing; made no objection to appearing by telephone; raised no objection following the hearing; and claimed no prejudice at any time to the district court. Petitioners fully participated in the evidentiary hearing, presented their own witness, did not contest the facts, and took no steps to appeal or otherwise contest the entry of the preliminary injunction until an award of attorney's fees became evident.

never took place, while the injunction in this case forever altered the legal relationship of the parties by compelling Petitioners to permit Respondent to display the peace symbol based upon an analysis of the merits of her claim.

Based upon the facts before that court, the preliminary injunction in *Smyth* did not change the legal relationship between the parties and served only to preserve the *status quo*. Based upon the fact specific context of this case, both the district court and the Eleventh Circuit correctly applied this Court's controlling precedents. Given these substantial factual differences, there is no meaningful conflict among the circuits that requires resolution by this Court. Nor does the petition for *certiorari* in this case articulate a discernable purpose to resolve significant legal issues beyond the private interests of the petitioners.

CONCLUSION

For the reasons stated herein, the petition for writ of *certiorari* should be denied.

Respectfully Submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 03-80103-CIV-MIDDLEBROOKS

T.A. WYNER and
GEORGE T. SIMON,

Plaintiffs,

v.

DAVID B. STRUHS, in his official capacity as Secretary, Florida Department of Environmental Protection, and
TERRENCE COULLIETTE, individually and in his official capacity as Park Manager of the John D. MacArthur Beach State Park,

Defendants.
_____/

OMNIBUS ORDER

THIS CAUSE comes before the Court upon Defendant Terrence Coulliette and David Struhs' Motion to Alter or Amend the Judgment (DE 85), filed February 11, 2004; Plaintiffs' Application for Award of Attorney's Fees and Reimbursement of Litigation Expenses (DE 89), filed February 27, 2004; and the Motion to Tax Costs (DE 88), filed by Defendants on February 27, 2004. The Court has

reviewed the record and is otherwise fully advised in the premises.

Introduction

The above-styled cause arose out of a dispute between the Defendants, representatives of the Florida Department of Environmental Protection ("DEP"), and Plaintiffs, private citizens, over the constitutionality of two Florida Administrative Code Rules ("FAC"), the "Free Speech Activities Rule" and the "Bathing Suit Rule." On February 12, 2003, Plaintiffs filed the Complaint (DE 1) and Emergency Motion for Temporary Restraining Order and/or Preliminary Injunction (DE 4) seeking Court intervention to prevent state park officials from interfering with a protest consisting, *inter alia,* of the formation of a temporary art installation comprised of nude bodies in the form of a peace sign, scheduled to take place on February 14, 2003. On February 13, 2003, this Court issued an Order (DE 8)[1] prohibiting state officials at the park from arresting Ms. Wyner or otherwise interfering with her temporary art installation. Defendants' Motion for Summary Final Judgment (DE 45) was filed November 17, 2003 and Plaintiffs' Motion for Summary Judgment (DE 55) was filed December 8, 2003. On January 8, 2004, the Court issued an Order on Motions for Summary Judgment (DE 83) granting Summary Judgment in Defendants' favor. The Court entered Final Judgment (DE 84) in favor of Defendants and against Plaintiffs upon the Complaint and retained jurisdiction for the purpose of awarding costs and fees, including those

[1] A Corrected Order Granting Motion for Temporary Restraining Order or Preliminary Injunction (DE 11) was subsequently issued on February 27, 2003.

expended on the Motion for Preliminary Injunction upon which Plaintiffs prevailed.

Defendants now move to alter the final judgment to correct the finding that Plaintiffs are prevailing parties. Plaintiffs move for fees and costs. Defendants move for costs.

Alteration of the Judgment

On the merits, this Court finds no good cause to alter or amend its prior ruling. A motion to alter or amend a judgment must indicate why the court should reconsider its prior decision and "set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." *Wendy's Int'l, Inc., v. Nu-Cape Construction, Inc.*, 169 F.R.D. 680, 684 (M.D. Fl. 1996). There are generally three grounds upon which reconsideration of an order is appropriate: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct error or manifest injustice. *See id.; Sussman v. Salem, Saxon & Neilson, P.A.*, 153 F.R.D. 689, 694 (M.D. Fla. 1994). None of these standards has been met. Plaintiffs did not prevail on every claim asserted in the litigation. They did, however, achieve one of the primary purposes for filing this litigation, prevention of the Defendants from interfering with the temporary art installation planned for February 14, 2003.

Defendants argue that Plaintiffs are not prevailing parties because they did not ultimately prevail on a legal issue. Plaintiffs did prevail on a legal issue. Plaintiffs brought both facial and as applied challenges to the park restrictions. The Court

ruled in Plaintiffs favor on their prayer "for injunctive relief prohibiting defendants from denying or otherwise interfering with the creation of a temporary art installation comprised of nude bodies in the form of a peace sign in MacArthur Beach State Park on February 14, 2003." (Pls. Compl. ¶ (43)(a)). The Court's Order granting Plaintiffs' motion prevented Defendants from preventing or interfering with Plaintiffs' February 14, 2003 temporary art installation. The preliminary injunction expired on its own terms. Consequently, after prevailing on their legal challenge to Defendants' application of the regulation to the February 14, 2003, temporary art installation,[2] Plaintiffs were unsuccessful on their facial challenge of the regulations. The Court did not and was unable to revisit Plaintiffs' as applied challenge.[3] Accordingly, unlike in the cases cited by Defendants, the Court did not revisit and reverse its earlier decision regarding the same legal issue. The Court does not find good cause to alter or amend its prior judgment.

Attorneys' Fees

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[2] As the Court made clear at the hearing on January 21, 2004, the driving force behind its decision was the testimony of Chief of Operations for the Florida Park Service, Peter Scalco that one of the factors used in determining whether or not to apply Rule 62D-2.014(7)(b) to Ms. Wyner's activity was that it was different from her other activities because it seemed "to be about a peace demonstration." (Prelim. Injunc. Hearing at 61). From Mr. Scalco's testimony, the Court perceived the DEP to be applying the rules in a content-based and therefore unconstitutional manner.

[3] In the absence of any particular facts to which the regulations could be applied, at the summary judgment stage, the Court was able to treat Plaintiffs' constitutional challenge only as a facial one.

Pursuant to 42 U.S.C. Section 1988, Plaintiffs move for an award of attorney's fees and litigation expenses through the preliminary injunction and February 14, 2003 protest, and then from February 13-25, 2004. 42 U.S.C. Section 1988 provides that "[i]n any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Defendants respond that as discussed in their Motion to Alter or Amend Judgment, Plaintiffs are not entitled to an award of attorneys' fees. The Court has already found that Plaintiffs were prevailing parties at the preliminary injunction stage and retained jurisdiction to award fees and costs to Plaintiffs for expenses associated with that stage of the litigation. It is thus unpersuaded by said argument.

The starting point in any "reasonable fee" determination is the number of hours reasonably expended on the litigation multiplied by the reasonable hourly rate. *Hensley v. Eckerhart,* 461 U.S. 424 (1983). The resulting point is known as the "lodestar." *Id.* The lodestar may thereafter be enhanced or reduced based on the results obtained or the risk of non-payment. *Pennsylvania v. Delaware Valley Citizens Council II,* ("Delaware II") 483 U.S. 711, 745 (1987); *Pennsylvania v. Delaware Valley Citizens Council I,* ("Delaware I") 478 U.S. 546 (1986). Where the objective sought was in fact obtained, the full lodestar amount should be awarded. *Norman v. Housing Authority of City of Montgomery,*

836 F.2d 1292 (11th Cir. 1988). "If the result was excellent, then the court should compensate for all hours reasonably expended." *Id.* at 1302 (citing *Popham v. Kennesaw*, 820 F.2d 1570, 1578 (11th Cir. 1987)).

In considering whether to adjust the lodestar amount upward or downward, a court may wish to consider any of the twelve factors enumerated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974);[4] *Hensley*, 461 U.S. at 436. However, enhancement of the lodestar should only be made in exceptional cases where need and justification for such enhancement are readily apparent and supported by clear evidence of record. *Delaware II*, 483 U.S. at 728. *See also Norman*, 836 F.2d at 1302. The Supreme Court has rejected enhancements for calculated lodestar amounts in cases which involve federal fee-shifting statutes such as the one involved herein. *See City of Burlington v. Dague*, 505 U.S. 557 (1992). A downward adjustment of the lodestar may be required when the party being awarded fees achieved only limited success or spent time on unsuccessful and unrelated claims. *Hensley*, 461 U.S. at 436. A further downward adjustment may be required for

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[4] The 12 factors enumerated in *Johnson* are as follows: (1) the time and labor required; (2) the novelty and difficulty of the question; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *See Johnson*, 488 F.2d at 717-19.

"excessive, redundant, or otherwise unnecessary" hours. *Id.* at 434.

Plaintiffs seek $28,505.00 in fees for 82.3 hours of work performed by James K. Green and Randall C. Marshall at a rate of $350.00 per hour. Defendants make several arguments in opposition to Plaintiffs request. First, they argue that it is difficult to determine an appropriate award based on a fair proportion of the time spent on the preliminary injunction stage of the case as compared to the time spent on the entire case because Plaintiffs have only submitted the time records related to their work on the preliminary injunction. This argument is nonsensical. Plaintiffs do not seek nor are they entitled to fees for time spent on other aspects of the case. Accordingly, the Court has no desire to view the time records for the entire case.

Defendants argue that Plaintiffs should not be allowed a rate appropriate for specialists and also be allowed to bill for time spent researching the topic of their specialty. Defendants likewise take issue with time billed for (1) activities they assert a paralegal could have done and (2) activities related to the case in general. Defendants additionally contend that Plaintiffs' fee award should be adjusted downward in light of their limited success in this litigation.

In determining the reasonable hourly rate for the purpose of an attorneys' fees motion, the burden is on the moving party to establish the prevailing market rate, which is the rate charged in the community by lawyers of reasonably comparable skill, experience and reputation for similar services. *Blum v. Stenson,* 465 U.S. 886, 895-96, n. 11 (1984); *NAACP v. City of Evergreen,* 812 F.2d 1332, 1338

(11th Cir. 1987); *Gaines v. Dougherty County Bd. Of Education,* 775 F.2d 1565, 1571 (11th Cir. 1985). "The decision regarding the appropriate hourly rate may be made either by analyzing the affidavits submitted by counsel or, if this documentation is insufficient, by relying upon the court's expertise." *Norman,* 836 F.2d at 1303; *Avirgan v. Hull,* 705 F. Supp. 1544, 1549 (S.D. Fla. 1989).

Satisfactory evidence of the market rate, however, requires more than the mere affidavit of the attorneys performing the work. *Blum,* 465 U.S. at 896. Also insufficient is testimony that a given fee is reasonable; evidence must be of rates actually billed and paid. *Hensley,* 461 U.S. at 439 n. 15. Such evidence may be adduced from charges of lawyers under similar circumstances or by opinion evidence. *Norman,* 836 F.2d at 1299. When analyzing the market rates being attested to, the Court may consider any of the twelve *Johnson* factors referred to previously. *Delaware Valley I,* 478 U.S. at 564-69. One of those factors, the hourly rate normally charged by the applicant's counsel, has been deemed the logical starting place in any rate determination. *Vaughns v. Bd. Of Education,* 598 F.Supp. 1262 (D. Md. 1984), *aff'd* 770 F.2d 1245 (4th Cir. 1985); *Zeffiro v. First Pennsylvania Bank, N.A.,* 574 F.Supp. 443, 447 (E.D. Pa. 1983), *aff'd without opinion,* 746 F.2d 1469 (3d Cir. 1984). *See also Florida Pawnbrokers v. Fort Lauderdale,* 711 F.Supp. 1084, 1086-87 (S.D. Fla. 1989). Also considered probative are the rates billed in similar lawsuits and the relative skill of the attorneys involved. *Norman,* 836 F.2d at 1299.

The hourly rate sought for the attorneys in this matter is $350 per hour. Attorneys Green and

Marshall are constitutional litigators with twenty years of experience. Attorney Green's current billing rate to private clients is $350 per hour. Attorney Marshall is the legal director for the American Civil Liberties Union Foundation of Florida, Inc., and as a full-time staff attorney for that organization, does not bill clients. Attorney Marshall's rates accordingly must be pegged to the prevailing community rates. *Blum v. Stetson,* 465 U.S. 886, 895 (1984).

In filing a petition for fees, the burden is upon plaintiffs to establish the prevailing market rate for their lawyers' services. Plaintiffs do that by offering affidavits and case law supporting their requested rates. Defendants contest the rate and request an evidentiary hearing in order to cross examine David J. Sales, who submitted an affidavit in support of Plaintiffs' request. They, however, offer no evidence to contradict Plaintiffs' requested hourly rates nor suggest what they believe to be an alternate prevailing market rate in the Southern District of Florida. In the instant case, an evidentiary hearing is unnecessary as there are no disputes of fact and the written record is sufficient to enable the trial court to make a determination regarding fees. Based on the Court's expertise regarding hourly rates, the Court will reduce the requested rate for both attorneys from $350 to $315 per hour.

The Court finds no merit to Defendants other objections. Plaintiffs seek fees only to the extent of their success. A downward adjustment based upon the degree of success is accordingly unnecessary. After a review of the time records, the Court finds that Counsel for Plaintiffs exercised appropriate billing judgment.

Costs

Defendants move pursuant to 28 U.S.C. § 1920 and Rule 54(d)(1) of the Federal Rules of Civil Procedure for costs incurred in this action. Plaintiffs respond that (1) because they are the prevailing party, Defendants are not entitled to costs; (2) Defendants' motion is unsupported and not recoverable; and (3) that taxing costs against Plaintiffs would be inequitable.

Although Plaintiffs were the prevailing party with regard to the preliminary injunction, final judgment was entered in favor of Defendants and they are entitled to costs. Under 28 U.S.C. § 1920, reimbursements for only the following costs may be awarded: (1) fees of the clerk and marshal; (2) fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) fees and disbursements for printing and witnesses; (4) fees for exemplification and copies of papers necessarily obtained for use in the case; (5) docket fees under section 1923 of this title; and (6) compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1928 of this title.

In their Motion to Tax Costs, Defendants requests [sic] reimbursement as follows:

1.	Copying Costs	$1,518.55
2.	Process Servers	$ 68.00
3.	Deposition Transcripts	$3,603.86
4.	Long Distance Telephone	$ 79.79
5.	Federal Express	$ 70.46
	TOTAL	$5,340.66

Copying taxes will be taxed as costs if Defendants establish that copies were necessarily obtained for use in the litigation and Defendants presents [sic] evidence of such. *Cullens v. Georgia Dept. of Transportation*, 29 F.3d 1489, 1494 (1994). No evidence was presented regarding these copying fees. The fees will therefore be disallowed. The deposition transcripts were "necessarily obtained for use in the case," and are taxable under 28 U.S.C. § 1920(2). *Morrison v. Reichhold Chems, Inc.*, 97 F.3d 460, 465 (11th Cir. 1996). Under *United States E.E.O.C. v. W & O, Inc.*, 213 F.3d 600, 624 (11th Cir. 200) [sic], the $68.00 process server fee may be taxed pursuant to 28 U.S.C. § 1920(1). Long distance telephone charges are appropriate under 28 U.S.C. § 1920 to the extent that they are reasonable. *Cullens v. Georgia Dept. of Transportation*, 29 F.3d at 1494. Because, however, the Court cannot determine if the calls were reasonable given the documentation provided by Plaintiff, [sic] $79.79 for long distance telephone calls will not be taxed as costs. Because in *Duckworth v. Whisenant*, 97 F.3d 1393, 1399 (11th Cir. 1996), the Eleventh Circuit has held such costs nonrecoverable under 28 U.S.C. § 1920, the Court will disallow Plaintiff's [sic] Federal Express costs. Accordingly, the Court must now decide whether it is equitable to tax $3,671.86 for Defendants costs.

It is within the discretion of the Court to decline to tax all or some of the costs. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987). In determining whether to tax costs, the Court should consider the equities and public interests at stake. *County of Suffolk v. Secretary of Interior*, 76 F.R.D. 469, 472 (E.D.N.Y. 1977). In evaluating the equities of taxing costs, the Court can consider a variety of factors including the financial resources of the parties; whether the case concerns matters of public interest; and any possible deterrent effect on meritorious litigation. *Id.; Muller v. United States*, 811 F.Supp. 328, 329 (N.D. Ohio 1992). The Court finds that an assessment of $3,671.86 in costs in the instant case would be burdensome to Plaintiffs and of little benefit to Defendants. Plaintiffs claim was not frivolous and concerned a matter of public interest. An assessment in whole might also deter future litigants from pursuing first amendment claims.

Plaintiffs seek reimbursement for $687.00 in costs. Defendants offer no objection. The Court finds it equitable to hold Plaintiffs responsible for $687.00 of Defendants costs and Defendants responsible for $687.00 of Plaintiffs costs. Therefore, no judgment will be entered against either party regarding costs.

Accordingly, and for the foregoing reasons, it is hereby

ORDERED AND ADJUDGED that Defendant Terrence Coulliette and David Struhs' Motion to Alter or Amend the Judgment (DE 85) is DENIED. Plaintiffs' Application for Award of Attorney's Fees and Reimbursement of Litigation Expenses (DE 89) is GRANTED IN PART. The

Motion to Tax Costs (DE 88) is GRANTED IN PART.

It is FURTHER ORDERED AND ADJUDGED that the Clerk of the Court shall enter judgment in favor of the Plaintiffs and as against Defendants for $25,924.50 representing attorneys' fees.

DONE AND ORDERED in Chambers at West Palm Beach, Florida this 16th day of August, 2004.

DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies to counsel of record